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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. [REDACTED] 129

SAMUEL H. RABIN,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MICHIGAN
AND BRIEF IN SUPPORT THEREOF.

✓
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1486

SAMUEL H. RABIN,

vs.

Petitioner,

THE PEOPLE OF THE STATE OF MICHIGAN,

Respondent

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MICHIGAN**

*To the Honorable, the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Petitioner, Samuel H. Rabin, prays for the issuance of a writ of certiorari to review the decisions of the Supreme Court of the State of Michigan, in affirming, on April 17, 1947, the judgment of the Recorder's Court for the City of Detroit, in the State of Michigan, and in denying, on May 15, 1947, petitioner's application for re-hearing, in connection with certain criminal proceedings.

I

Statement of the Case ¹

Petitioner was tried in the Recorder's Court for the crime commonly called "arson." The information filed against

¹ Because of petitioner's desire to file this petition before this Court adjourns, and the fact that at the time of writing of same the printed record is not available, references thereto cannot be made. Some references, however, will be made to the printed record in the State Supreme Court and the opinion of that Court printed in 27 N. W. 2d 126.

him under sections 71 et seq., P. A. 1931, of the State of Michigan (Mich. Stat. Ann., sections 28.266 et seq.) contained 5 counts:

1. For burning a certain occupied dwelling house;
2. For burning a certain building within the curtilage of an occupied dwelling house, to-wit, a store building;
3. For burning a store building, said building not being a dwelling house or a building within the curtilage of a dwelling house;
4. For burning personal property with intent to injure and defraud insurers;
5. For burning a certain building with intent to injure and defraud insurers.

At the trial the people claimed, through its witnesses Slew, Rubenstein, and Lebove, that petitioner hired and procured them to set the fire. Admittedly there is no proof whatsoever that petitioner had any participation in the physical preparation or setting of the fire. Indeed the undisputed proofs showed that he and his entire family were absent from the city during the entire day (see 27 N. W. 2d, at p. 128). Petitioner claims that in such circumstances he should have been charged with "procuring" and not "burning"; that proof of "procurement" (the only proof against him) could not sustain a charge of "burning"; that he was therefore convicted without due process of law of a crime not charged against him. This point was urged upon the State Supreme Court, but without success.

During the course of the argument of counsel to the jury, two jurors failed to appear because of illness. It was then agreed by the prosecutor, counsel for petitioner, and petitioner, that the case proceed with the ten remaining jurors. This consent was oral and not in writing (see 27 N. W. 2d, at p. 130).

It also appeared that at the same time another juror, Mrs. Hanson, although present advised the court that she was ill. Upon her statement, in answer to the judge's query whether she could "go ahead today," that she was "able to go ahead" but not after today, the prosecutor and counsel for petitioner agreed to proceed² (see 27 N. W. 2d, at pp. 130-1).

Toward the close of the arguments, two jurors reported to the court that they were not feeling well. One inquired whether she could be excused after this case. The judge told them to see him after the case was over and told at least one of them that he "would probably excuse her" at the termination of this case.³ After this colloquy, the record shows that the arguments were concluded, the lengthy charge given to the jury, the jury retired, deliberated, and reached a verdict all in one day.⁴

Petitioner urged in his assignments of error to the State Supreme Court that the waiver was a nullity, that the jury of ten was illegal, and its verdict void, that undue pressure or coercion was used upon the jurors in their deliberations, that consequently he was denied his constitutional right to

² See pp. 331-2 of the printed record in the State Supreme Court:

"The Court: Are you able to go ahead today Mrs. Hanson?"

"Mrs. Hanson: *Not after today.*"

"The Court: *Well not after today.* Do you think you could go ahead today?"

"Mrs. Hanson: I'll try."

³ See p. 364, *idem*:

"The Court: I think I should advise counsel. I always believe in doing that. The Court communicated with two jurors. I will tell you what was said. The juror, number eight, who wasn't feeling well, wants to know if she could be excused *after the termination of this case, and I advised her I would talk to her at any time and indicated that I would probably excuse her.* The other juror, I think it was number five, she wasn't feeling well, either, and I said '*You ladies see me after the case is over.*'" (Italics supplied.)

⁴ See p. (x) of the printed record in the State Supreme Court.

trial by jury as commanded by the Federal and State Constitutions, as well as due process of law under the Fourteenth Amendment to the Federal Constitution. The court considered these questions and held that the waiver was legal, and the verdict valid.

Application for re-hearing repeating petitioner's claim of denial of his constitutional rights was duly submitted and denied by the State Supreme Court.

On petitioner's application, that court on May 21, 1947, stayed proceedings for a period of 30 days to enable petitioner to apply to this Court for a writ of certiorari and for further stay. A petition for such further stay was presented to this Court (Reed and Jackson, J.J.) on June 10, 1947, but was denied without prejudice and with leave to renew upon the filing of this petition for certiorari.

II

Questions Presented

A. Was petitioner deprived of due process of law under section 1 of the 14th Amendment to the Constitution of the United States, because the information failed to charge the crime proved (allegedly) against him?

B. Does a trial under the laws of the State of Michigan by jury of ten members upon oral consent of a defendant, constitute due process of law under such 14th Amendment?

C. Was there such influencing or coercion of the jury as to void its verdict under such 14th Amendment?

III

Reasons for Allowance of the Writ

A. The Supreme Court of the State of Michigan has considered and denied petitioner's claim that under the 14th Amendment, he must be charged with the crime proved against him.

B. The Supreme Court of the State of Michigan has considered and denied petitioner's claim that under Article II, section 19, of the Constitution of 1900 of the State of Michigan, only a jury of twelve members can convict him in accordance with due process of law under the 14th Amendment.

C. The Supreme Court of the State of Michigan has considered and denied petitioner's claim that the jury was so influenced and coerced as to make its verdict a nullity and a denial of due process of law.

IV

Prayer

WHEREFORE, petitioner, Samuel H. Rabin, prays that a writ of certiorari issue under the seal of this Court directed to the Supreme Court of Michigan commanding the said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Court had in this cause numbered on its docket No. 43-273, and entitled "People of the State of Michigan, Plaintiff and Appellee, v. Samuel H. Rabin, Defendant and Appellant," to the end that this cause may be reviewed and determined by this Court and that the judgment of the said Supreme Court of Michigan be reversed and for such further relief as this Court may deem proper.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion of the Court Below

The opinion of the Supreme Court of Michigan has not been as yet officially reported, but has been reported in volume 27 N. W. 2d, p. 126.

II

Jurisdiction

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C., Section 344).

III

Statement of Case

A summary statement of the case has already been made in the Petition for a Writ of Certiorari under heading I, which is hereby adopted and made a part of this brief.

IV

Specifications of Error and Summary of Argument

A. The Supreme Court of the State of Michigan erred in not holding that the information did not include the crime proved, and that petitioner was not denied due process of law.

B. The Supreme Court of the State of Michigan erred in holding that a jury of ten members, with oral consent of a defendant, is a legally constituted jury under the laws and

Constitution of the State of Michigan, and that its verdict, followed by sentence, is not a denial of due process of law.

C. The Supreme Court of the State of Michigan erred in not holding that the jury was so influenced and coerced as to make its verdict a violation of due process of law.

Argument

A

Petitioner was charged with "burning" rather than "procuring" the burning under section 71, Act 328, P. A. 1931 (Mich. Stat. Ann., section 28.266) which defines "burn" to mean setting fire to, etc., as well as procuring another to do such act. Petitioner contended that since the only proof was that he might have "procured", the law of the State of Michigan commanded that he be charged specifically with the "procuring", and that failure to do so was denial of due process of law.

Meister v. People, 31 Mich. 99, held precisely that the arson statute made a distinction between the burner and the procurer and necessitated specific indictment accordingly. Proof of one could not be made under charge of the other even though statute at that time made every accessory liable as principal (see 99 Mich. at 111). The State Supreme Court, without overruling the *Meister* case, overruled petitioner's contention stating that the statute as now amended authorized such action (see 27 N. W. 2d, at p. 129).

The State Court's affirmance of the procedure under such statute (which simply put into one section what the earlier statutes had in several sections) has effectually permitted petitioner to be convicted of a crime not charged against him.

Conviction of a crime not charged is void and a denial of due process of law under the 14th Amendment to the Constitution of the United States.

DeJong v. Oregon, 299 U. S. 353.

The construction of the present statute by the State Supreme Court has deprived petitioner of his rights under the 14th Amendment. Under such circumstances, this Court should review.

Cf. *Standard Oil Co. v. Johnson*, 316 U. S. 481.

B

Article II, section 19, of the Constitution of 1908 of the State of Michigan, guarantees every accused the right to trial by jury, which may consist of less than 12 members in courts not of record.⁵ Article V, section 27, provides on the other hand that the legislature may authorize trial by jury of less than 12 members.

Section 17131, Comp. L. 1929 (Mich. Stat. Ann., section 28,856), now provides for waiver of a jury and election to be tried by the judge by a writing signed by defendant and filed in the cause.

The State Supreme Court has agreed with petitioner that no legislative action has been taken under Article V, section 27, to reduce the size of the jury, and that the statute mentioned applies only to complete waiver of the jury and not to waiver of one or two members (see 27 N. W. 2d, at p. 130). But by sustaining the validity of the 10-member jury, the State Supreme Court has, in destroying petitioner's right to a duly constituted, legal jury, ignored or evaded the established law, that the Constitution, by necessary implication, requires a jury of not less than 12 members; that there can be no waiver of a jury because at

⁵ The Recorder's Court of the City of Detroit is a court of record.

common law a trial by jury prevailed exclusively in criminal cases,

People v. Henderson, 246 Mich. 481;

that prior to the enactment of the statute mentioned above, even though a defendant may waive a jury by pleading guilty, this is an exception and the right "cannot be waived, and that a trial by the judge, even by consent of the prisoner, is erroneous;"

People v. Warren, 122 Mich. 504;

that the constitutional provision guaranteeing right to jury trial means a "trial by a jury of 12 good men and true" and that a legislative act authorizing a trial judge to excuse a juror because of illness is unconstitutional,

McRae v. Railroad Co., 93 Mich. 399.

While the right to trial by jury as such is not protected by the due process clause, nevertheless, the State of Michigan having established the jury as part of the judicial machinery in the administration of criminal justice, that jury must be one which is duly constituted under applicable laws.

Cf. Brown v. New Jersey, 175 U. S. 172.

The right to a jury trial embraces the right to a proper jury.

Glasser v. United States, 315 U. S. 60.

Right to trial by jury is a fundamental right, which, having been granted by the State, is protected by the 14th Amendment. Thus discrimination in the selection of a jury is struck down by such amendment.

Norris v. Alabama, 294 U. S. 587.

State courts are bound to proceed in such manner that all substantive rights of the parties under controlling Federal laws are protected. Whether the State Supreme Court did, raises a Federal question reviewable by this Court.

Garrett v. Moore-McCormack Co., 317 U. S. 239.

Thus the denial by the State Court of the fundamental right to counsel is the denial of a fair trial and the denial of due process of law.

DeMeerleer v. Michigan, 329 U. S. 663.

In *People v. Mitchell*, 266 N. Y. 15, 18, the court said:

“Trial by jury in all cases in which it has been heretofore used shall remain inviolate forever (N. Y. Const. art. I, sec. 2). *If defendant was tried otherwise than by a common law jury of twelve men he has been convicted without due process of law.*” (Italics supplied.)

C

The illness of the two jurors, reported to the trial judge, his direction to them to proceed for the day and the promise to excuse them at the close of the case cannot be casually brushed aside as it was by the State Supreme Court. To say that these jurors were not thereby induced and coerced into a quick decision by the hope of excusal at the end of the case by the trial judge's action, is to ignore predictable human behavior. That these jurors were willing to reach any decision, not because of the evidence before them, but because of their desire to go home, seems more than a fair inference from this record.

In view of the illness of the two jurors and their desire to be excused, the fact that the arguments to the jury were completed, the lengthy charge given, the jury retired and

reached a verdict all in one day after a week-long trial is indicative evidence of coercion in reaching a decision.

Cf. *Peterson v. United States* (C. C. A. 9, 1914) 213 F. 920.

An agreement to a verdict induced by a desire of a juror to be relieved because of his illness is the result of coercion, and is, in law, no verdict.

United States v. Pleva (C. C. A. 2, 1933) 66 F. (2d), 529.

Judicial pressure whether acting on the hopes or fears of the jurors is improper. A verdict hastened by the action of the judge, however worthy the motive, cannot be the result of that deliberation which the law requires.

People v. Golub, 333 Ill. 554;

People v. DeMaux, 194 Mich. 18.

Coercion of a jury is tantamount to the direction of a verdict and deprives a defendant of "that fair and impartial trial the law accords to them, no matter how convincing their guilt may appear."

Wissel v. United States (D. C. A. 2, 1927) 22 F. (2d) 468, 471.

Coercion of a jury into reaching a verdict is a denial of due process of law under the decisions of this Court.

Moore v. Dempsey, 261 U. S. 86;

Frank v. Mangum, 237 U. S. 309.

Conclusion

The State Supreme Court, in affirming as it did petitioner's conviction, has denied him the due process of law guaranteed by the 14th Amendment.

We therefore pray that a writ of certiorari issue from this Court to the Supreme Court of the State of Michigan to review its affirmance of said conviction of petitioner by the Recorder's Court for the City of Detroit, in the said State of Michigan, and said Court's denial of his application for rehearing, and that the judgment of said Court be reversed on hearing and the cause remanded for further proceedings within the limitations of established constitutional restraints.

Respectfully submitted,

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